IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 48 OF 2003

Mukeshkumar Pandya,
r/o Village Gauri
Shankar Bangra,
Tal. Jalalpur,
Dist. Chapara,
Sarah, Bihar State,
presently in custody
at Central Jail,
Aguada, Goa. ... Appellant

versus

State,
through the Public
Prosecutor. ... Respondent.

Mr. S. G. Bhobe, Advocate for the Appellant.

Mr. S. N. Sardessai, Public Prosecutor for the State.

CORAM : P. V. HARDAS, J.

DATED : 8TH JANUARY, 2004.

ORAL JUDGMENT

The Appellant/Accused stands convicted for an offence punishable under Sections 363, 365, 376 and 506(II) of the Indian Penal Code and is sentenced for

Rigorous Imprisonment for one year, fine of Rs.1000/-, in default Simple Imprisonment for two months, Rigorous Imprisonment for two years, fine of Rs.1000/-, in default Simple Imprisonment for two months, Rigorous Imprisonment for seven years, fine of Rs.2000/-, in default Simple Imprisonment for six months and Rigorous Imprisonment for six months respectively, by the Additional Sessions Judge, Mapusa, by Judgment dated 7th May, 2003, rendered in Sessions Case No. 6 of 2002.

2. The facts as are necessary for the decision of this Appeal are stated hereunder:-

P.W.14, Sammy Tavares, was attached to the Mapusa Police Station. On 22nd October, a complaint at Exh.48 was filed by P.W.9, Ashok Tadwalkar, against the Appellant/Accused, complaining that the Appellant/Accused had committed rape on the sister of the first informant. On the basis of the said complaint at Exh.48, an offence vide Crime No.287/2001 under Sections 506(II), 342 and 376 of the Indian Penal Code came to be registered. The victim namely P.W.13, Rajashree Tadwalkar, was referred for medical examination and was examined by P.W.2, Dr. E. J. Rodrigues. P.W.2, Dr. E. J. Rodrigues, found that there was a bruise, fresh, reddish at 5-7 O'clock

position of hymen, tender to touch and oedematous with no bleeding. He also noticed that there was tenderness on both breasts on palpation. The report of the examination of the prosecutrix is at Exh.16. The examination of the vaginal swabs and smears conducted in the department of the Goa Medical College tested positive for spermatozoa. P.W.2, Dr. E. J. Rodrigues, therefore, opined that there was recent forcible penetration. Meanwhile, the scene of the offence panchanama at Exh.50 was executed at Exh.30 in the presence of P.W.5, Arun Tendulkar. The clothes of the prosecutrix came to be attached vide Exh.50 in the presence of P.W.10, Bhimashankar Basanna Durg. The Accused after his arrest was referred for medical examination and was examined by P.W.2, Dr. E. J. Rodrigues, who noticed five injuries on the person of the Accused, which were in consonance with the evidence of the Accused having been beaten by the nearby residents. The Accused was examined and was found to be physically fit with nothing to indicate that the Accused was incapable of performing sexual intercourse. The statements of the witnesses came to be recorded and further to the completion of the investigation, a charge-sheet against the present Appellant came to be filed.

3. On committal of the case to the Court of

Sessions, charge was framed where the Accused pleaded not guilty and claimed to be tried. The prosecution in support of its case examined 18 witnesses. The defence of the Accused in his Statement under Section 313 of the Code of Criminal Procedure was that he had not committed an offence and had been falsely implicated on account of family disputes, in particular with P.W.9, Ashok Tadwalkar. The learned Trial Court on acceptance of the evidence of the prosecution found the Accused guilty and convicted and sentenced him accordingly.

4. The pivot of the prosecution case is the evidence of the prosecutrix. P.W.13, Rajashree Tadwalkar, states that at the time of the incident, she was residing at Regim Construction at Mapusa, along with her parents, two brothers and one sister. She knew the Accused as he was residing in a building of Regim Construction at Mapusa on the ground floor. The premises, occupied by the Accused, consisted of a shop. On the day of the incident, after her parents and brothers had left for work, she was in the house in the company of her elder sister Jayashree. At about 11.00 a.m., her sister Jayashree prepared tea and carried it to the construction site for serving tea to the family members. At about 12 noon, P.W.13, Rajashree, left the house and went to a nearby shop

for purchasing chocolates and while returning from the shop, the Accused caught hold of her hand and forcibly took her inside his room and by brandishing a knife demanded that P.W.13, Rajashree, should marry. P.W.13, Rajashree, refused and attempted to escape but the Accused had caught hold of her hand and had again threatened her with knife. The Accused had also threatened to kill her in case she raised shouts. The Accused then denuded her and after removing his clothes made her lie on a mat spread on the floor and committed forcible sexual intercourse with her. While P.W.13, Rajashree, was to leave the room, the Accused had warned her that in case she made disclosures about this incident, he would kill her. After reaching her house, her brother Ashok asked her where she had gone and slapped her. Thereafter, she narrated the incident to her mother. The family members searched the Accused but he was not found. The Accused was found late in the evening and was mercilessly beaten by her brother Ashok and the nearby residents. She has identified the clothes which she was wearing on the day of the incident. In the cross-examination, she has admitted that no one was residing on either side of the room of the Accused. In the cross-examination, she has also admitted that she was walking on a footpath when the Accused had caught hold of her hand. Initially, she did say that at that time

the Accused was armed with a knife but corrected herself by stating that at that time the Accused was not armed with a knife. She demanded the suggestions that the Accused had not committed the offence.

5. The evidence of P.W.13, Rajashree, to a large extent stands corroborated by the medical evidence of P.W.2, Dr. E. J. Rodrigues, who found hymenal tear which was fresh and was tender to touch. The medical evidence clearly corroborates the version of P.W.13, Rajashree, that she was subjected to forcible sexual intercourse. As far as the incident is concerned, the evidence of P.W.13, Rajashree, is by her brother and the evidence of her mother, P.W.12, Nagavva Vithal Siddhana. P.W.9, Ashok Tadwalkar, does state about returning in the afternoon and not finding her 13 year old sister P.W.13, Rajashree, in the house. He further states about his mother disclosing to him in the evening that P.W.13, Rajashree, had disclosed to her that the Accused had committed rape on her. P.W.12, Nagavva Vithal Siddhana, the mother of prosecutrix also states about P.W.13, Rajashree, disclosing about the incident to her and of P.W.13, Rajashree, narrating the incident to P.W.9, Ashok Tadwalkar. Ofcourse, there appears to be slight discrepancy in the evidence of P.W.13, Rajashree and P.W.12, Nagavva Vithal Siddhana, on one hand and the

evidence of P.W.9, Ashok Tadwalkar, on the other hand. Both P.W.13, Rajashree and P.W.12, Nagavva Vithal Siddhana state about P.W.9, Ashok Tadwalkar, questioning P.W.13, Rajashree and P.W.13, Rajashree, disclosing the incident to him. P.W.9, Ashok Tadwalkar, does not refer to any disclosures made to him by P.W.13, Rajashree. This is a contradiction on a very minor aspect of the prosecution case. It can be turned either as an exaggeration or a contradiction as a result of aberration of memory. It has to be understood that the prosecution witnesses in this case are illiterate labourers working at construction site. That apart, any contradiction being material bearing on the prosecution case should relate to the basic substratum of the prosecution case. A mere omission or contradiction to the relation of peripheral aspect of the prosecution case would not render the prosecution or the evidence of the witnesses liable to be rejected.

6. The prosecution has also, through the evidence of P.W.2, Dr. E. J. Rodrigues, attempted to prove the report of the radiological examination conducted by one Dr. Kamat who was not examined during the trial. As per the report at Exh.22, he found the prosecutrix to be aged 14 years with a

margin of six months either side.

7. Mr. S. G. Bhobe, learned Counsel appearing on behalf of the Appellant has taken an exception to the admissibility of this report at Exh.22 on the ground that Dr. Kamat had not been examined by the prosecution and P.W.2, Dr. E. J. Rodrigues, does identify the signature. In such circumstances, Mr. Bhobe, learned Counsel appearing on behalf of the Appellant suggests and rightly so that Exh.22 would be inadmissible evidence. The learned Counsel appearing on behalf of the Appellant further elaborates this aspect by then stating that the prosecution had not been able to prove the exact age of P.W.13, Rajashree and, therefore, it would be reasonable to infer that prosecutrix was aged 16 years and the evidence on record would suggest that she had consented for the sexual intercourse.

8. Assuming that the learned Counsel appearing on behalf of the Appellant is right in his contention that Exh.22 is inadmissible evidence but that does not advance the contentions sought to be urged further. The first information report at Exh.48 lodged by P.W.9, Ashok Tadwalkar, clearly states the age of the prosecutrix as 13 years. P.W.12, Nagavva Vithal Siddhana, mother of prosecutrix states when her

evidence was recorded P.W.13, Rajashree, was 15 years of age. The prosecutrix has stated her age as 13 years when examined by P.W.2, Dr. E. J. Rodrigues. There is hardly any effective cross examination to contest the case of the prosecution witnesses that the prosecutrix P.W.13, Rajashree, was aged 13 years at the time of the incident. So, therefore, even if the radiological examination report at Exh.22 is discarded, there is overwhelming evidence to indicate that the prosecutrix was below the age of 16 years when the offence was alleged to have been committed.

9. In the light of that, therefore, the plea of consent would not be available to the Accused. Evidence of P.W.13, Rajashree, is amply corroborated by the other evidence on record. There is nothing intrinsic in the evidence of P.W.13, Rajashree, to view the evidence of suspicion and, therefore, according to me, the prosecution has been able to establish an offence against the Appellant/Accused beyond reasonable doubt.

10. I have given my anxious consideration to the contention of the learned Counsel appearing on behalf of the Appellant and I find that the prosecution has proved the offence as alleged against the Accused

beyond reasonable doubt. The Appeal of the Appellant/Accused is sans merit and deserves to be dismissed.

11. Criminal Appeal No. 48 of 2003 is dismissed.

P. V. HARDAS, J.

RD.